

Commissioner, Indiana Department of Environmental Management

v.

Ashutosh Corporation d/b/a Cloverdale Travel Plaza,
Ashok K. Barghava and Harbhubinder Bains
2013 OEA 71, (13-S-J-4663)

OFFICIAL SHORT CITATION NAME: When referring to 2013 OEA 71 cite this case as
Ashutosh Corporation, 2013 OEA 71.

TOPICS:

owner
release
hearing
operator
diesel fuel
evidentiary
corrective action
failure to appear
regulated substance
underground storage tanks
Commissioner's Order to Comply
I.C. §13-23
I.C. § 13-23-12
I.C. §13-23-13-1(a)

PRESIDING JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: April Lashbrook, Esq.; Lisa M. McCoy, Esq.
Petitioners: Ashutosh Corporation, Harbhupinder Bains, Ashok K. Bhargava

ORDER ISSUED:

November 21, 2013

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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3. A prehearing conference was held on July 30, 2013. Counsel for the Petitioners and the IDEM appeared.
4. A hearing on the request for a stay of the effectiveness of the Commissioner's Order was set for August 14, 2013. It was continued to September 5, 2013 on the Petitioners' motion.
5. The Petitioners moved to withdraw the Petition for Stay of Effectiveness on September 5, 2013, which motion was granted on September 6, 2013.
6. On September 4, 2013, the ELJ issued an Order Setting Hearing. A final prehearing conference was scheduled for October 29, 2013; a final hearing was scheduled for November 8, 2013.
7. On October 17, 2013, counsel for the Petitioners, Donn H. Wray and Nicholas K. Gahl, moved to withdraw their appearances. The ELJ granted the motion to withdraw on October 22, 2013. The ELJ ordered counsel to provide a copy of the Order Granting Withdrawal to the Petitioners and to provide addresses for the Petitioners. Mr. Wray and Mr. Gahl complied with this order on October 28, 2013.
8. The final prehearing conference was held on October 29, 2013. The Petitioners were advised of the proceeding. See Motion to Withdraw Appearance, filed October 17, 2013 and Order Granting Withdrawal issued October 22, 2013. The Petitioners did not appear or request a continuance of the final prehearing conference.
9. The final hearing was held on November 8, 2013. The Petitioners were advised of the proceeding. See Motion to Withdraw Appearance, filed October 17, 2013 and Order Granting Withdrawal issued October 22, 2013. The Petitioners did not appear or request a continuance of the final hearing.
10. The IDEM presented testimony and other evidence on November 8, 2013.

FINDINGS OF FACT

1. The Cloverdale Travel Plaza is a truck stop located at 1032 N. Main St., Cloverdale Indiana consisting of about thirteen acres (the Site). Petroleum, including gasoline and diesel fuels, is stored and dispensed from five USTs at the Site. There are two 20,000 gallon USTs containing diesel fuel. These USTs were installed in September 2001.
2. On June 21, 2013, the IDEM issued the Commissioner's Order to the Petitioners.
3. The Petitioners filed their Petition for Administrative Review and Stay of Effectiveness on July 8, 2013.

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4. A final evidentiary hearing was held on November 8, 2013. The Petitioners did not appear at the hearing. IDEM Exhibits 1 through 22 were admitted into evidence. The IDEM called Thomas Newcomb, Joseph Stapinski and Roxann Sanders as witnesses. All witnesses are employees in the Underground Storage Tank/Leaking Underground Storage Tank Branch of IDEM.
5. On September 10, 2013, the IDEM propounded discovery to counsel for Petitioners, including Requests for Admissions (IDEM's Exhibit #1). The parties agreed to extend the deadline for responding to the discovery until October 29, 2013. The Petitioners were aware of this. *See IDEM Exhibit #2*. The Petitioners did not respond to the discovery requests. At the hearing, the IDEM moved to deem the Requests for Admission admitted. The ELJ granted the motion. The Petitioners are deemed to have admitted the truth regarding the following facts:
 - The Petitioners own real property located at 1032 N. Main Street, Cloverdale, Putnam County, Indiana.
 - On December 24, 2011, a release of diesel fuel occurred from the Site.
 - On April 20, 2013, a release of diesel fuel occurred from the Site.
 - The Petitioners have not taken corrective actions pursuant to 329 IAC 9-1-4-14.5 to mitigate or remediate either the December 24, 2011 or April 20, 2013 releases of diesel fuel that occurred from the Site.
6. The prior owners of this Site reported a release of regulated substances from the USTs in April, 2001 (Incident #200104507). The owners remediated this release, including removing the USTs. The IDEM determined that no further action was necessary for this release on May 29, 2007. IDEM Exhibit #18.
7. The Petitioners are the owners and operators of the USTs located at the Site. *IDEM's Exhibit #1, Requests for Admissions No. 1 and IDEM's Exhibit #4*.
8. The Petitioners became the owners of the Site on January 6, 2006. *IDEM's Exhibit #4*.
9. Releases of regulated substances from the USTs located at the Site were reported to the IDEM on 3 separate incidents between December 2011 and May 2013. These incidents were on December 24, 2011 (IDEM Incident #201202506); April 20, 2013 (U.S. EPA Emergency Response #35697); and May 13, 2013 (IDEM Incident #201305511).
10. The Petitioners were notified of each Incident and their obligation to undertake corrective action. In each instance, the Petitioners failed to undertake sufficient corrective action to mitigate and remediate the releases.

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11. In response to the December 24, 2011 release (Incident #201202506), the Petitioners took some action to prevent the release from migrating off of the Site. However, the Petitioners failed to take sufficient corrective action. Between December 24, 2011 and December 30, 2011, as a result of the Petitioners' failure to take appropriate action, the United States Environmental Protection Agency (U.S. EPA) responded to the release of diesel fuel from the USTs at the Site. *IDEM Exhibit #19.*
12. Again, as the result of the Petitioners failing to take sufficient and appropriate corrective action, the U.S. EPA responded to a second release of diesel fuel from the USTs at the Site on April 21, 2013 (Emergency Response #35697). *IDEM Exhibit #20, #21 and #22.* Diesel fuel left the Site and entered a drainage ditch, an unnamed tributary of Ferguson Branch and into a wetland area of a pond. *IDEM Exhibit #20.*
13. On May 13, 2013 (Incident #201305511), IDEM employees, Thomas Newcomb and Joseph Stapinski, inspected the Site. They observed indications that there had been a release of regulated substances at the Site. These indications included stained soil, free product on standing water (as indicated by sheen) and a substance with the characteristics of diesel fuel flowing into a trench being excavated. *IDEM Exhibits #7 and #8.* Mr. Newcomb and Mr. Stapinski determined that the substance was diesel fuel based on its odor and appearance. These conclusions are reasonable based on Mr. Newcomb's and Mr. Stapinski's experience as an IDEM UST inspector for several years. Laboratory tests confirmed that the substance was fresh oil with no weathering. *IDEM Exhibit #9.*
14. On May 13, 2013, the IDEM employees inspected the sumps underneath the fuel dispensers located at the Site. They observed staining on the equipment and free product and sludge in the sumps. Based on their experience, they concluded that the substance was diesel fuel. *IDEM Exhibit #6.*
15. These IDEM employees inspected the Site again on September 3, 2013 and October 4, 2103 and observed the same conditions at the Site. *IDEM Exhibit #11 and 12.* Hydrostatic testing was conducted on the sumps on October 4, 2013. Four of the seven sumps tested failed the hydrostatic testing. A representative of the Petitioners was present and was given a copy of the IDEM Office of Underground Storage Tank Compliance Inspection Additional Comments (IDEM Exhibit #13) summarizing the test results.
16. Joseph Stapinski, an IDEM UST inspector with several years of experience, inspected the Site on May 31, 2012 and February 8, 2013. He observed and noted water and diesel fuel in the sumps on May 31, 2012. These observations were recorded in a UST Inspection Compliance Summary and a copy was given to the facility representative on that date. *IDEM Exhibit #15.* On February 8, 2013, he noted that repairs were needed to the fuel dispensers. These observations were recorded in a UST Inspection Compliance Summary and a copy was given to the facility representative. *IDEM Exhibit #16.*

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Applicable Law

Pursuant to I.C. § 13-23, the IDEM has the authority to regulate the owners and/or operators of underground storage tanks. Pursuant to I.C. § 13-23-13-1(a), the Commissioner of the IDEM has the authority to compel the owner or operator of a UST to undertake corrective action with respect to any release of regulated substances from the underground storage tanks. Under I.C. § 13-23-13-12, the owner or operator has a duty to furnish information to the IDEM regarding the USTs, conduct monitoring or testing of the USTs, soil, ground water, surface water or air.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management (“IDEM”) is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3.
2. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
3. This office must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency’s initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). “*De novo* review” means that “all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings. *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind.Ct.App. 1981).
4. The tank systems located at the Site constitute underground storage tanks as defined by I.C. § 13-11-2-241.
5. Diesel fuel is a regulated substance pursuant to I.C. § 13-11-2-160(a).
6. The Petitioners are the owners and operators of the USTs at 1032 N. Main Street, Cloverdale, Putnam County, Indiana and as such, may be compelled to undertake corrective action to remediate the release of regulated substances under I.C. § 13-23-13-1(a).
7. There was a release of a regulated substance from the USTs on December 24, 2011, April 20, 2013 and May 13, 2013. As a result of the April 20, 2013 release, regulated substances, namely diesel fuel, entered waters of the State of Indiana.
8. Corrective action is necessary to identify and eliminate the sources of the releases and to remediate the impact of the releases.

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9. The Petitioners have not undertaken adequate corrective action to remediate the releases of regulated substances from the USTs at the Site.
10. The IDEM has the authority under I.C. § 13-23-13-1(a) to require the Petitioners to undertake corrective action to mitigate and remediate the release of regulated substances from the USTs located at the Site.
11. Pursuant to I.C. § 13-23-13-12, the IDEM has the authority to require the Petitioners to undertake the tasks specified in paragraphs 37 through 51 of the Commissioner's Order,

FINAL ORDER

AND THE ELJ, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that judgment is entered in favor of the Indiana Department of Environmental Management. The Commissioner's Order to Comply issued on June 21, 2013 is **AFFIRMED as to all terms and conditions**.

You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 21st day of November, 2013 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge